IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 14TH MARCH 2007 / \3RD PHALGUNA 1928

CRL.A.No. 157 of 2007()

SC.975/2004 of ADDL. DISTRICT & SESSIONS COURT (FAST TRACK COURT -I), THIRUVANANTHAPURAM

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APPELLANT/ACCUSED:

SIVADASAN, C.NO.951,
CENTRAL PRISON, TRIVANDRUM.

BY ADV. SRI.V.P.JOLLY (S.B)

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 157 OF 2007

Dated this the 14th day of March, 2007

JUDGMENT

The appellant faced trial for the charges framed under Section 55(a) read with Section 8(1) and (2) of the Abkari Act.

2. The prosecution case against the appellant was that on 11.3.2000 at 5.30 p.m. he was found in possession of 8 litres of arrack in a can having the capacity of 10 litres at a place called Kilirnukkam without any permit or licence under the provisions of the Abkari Act. To prove the case against the appellant, the prosecution examined PWs.1 to 6 and produced Exts.P1 to P7 as well as MO.1 black plastic can containing arrack. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. He denied the allegations levelled against him and stated that he was falsely implicated in the case by the excise officials. He further stated that no contraband article was seized from him and that he was taken into custody by the excise officials stating that he will be

released immediately. However, relying on the prosecution evidence, the trial court found the appellant guilty under Section 55(a) read with Section 8(2) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of one year. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. The main contentions raised by the learned counsel appearing for the appellant are (i) the trial court committed serious error in accepting the evidence of PWs.3 and 6 who were excise officials to find that MO.1 can containing 8 litres of arrack was seized from the appellant, (ii) PW.6, the Preventive Officer, Excise Circle Office, Attingal had not complied with the provisions of Sections 36 and 53 of the Abkari Act while detecting the crime and seizing the contraband article as the evidence of PWs.1 and 2 and the documents prepared by PW.6 would show that no contraband article was seized from the appellant as alleged by the prosecution and (iii)

even if the entire evidence adduced by the prosecution is accepted, the appellant cannot be convicted under Section 55(a) of the Abkari Act in the light of the decisions of this Court reported in **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri.) 631** and **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** as the prosecution failed to prove that the appellant was in possession of contraband article in connection with export, import, transport or transit.

5. PW.6, the then Preventive Officer, Excise Circle Office, Attingal who detected the crime, stated before the court below that on 11.3.2000 at 5.30 p.m. while he was on patrol duty along with other excise officials, he saw the appellant coming towards them with a can and that though he tried to escape on seeing the excise party, he was stopped and questioned. He further stated that on questioning the appellant, it was revealed that the can contained 8 litres of arrack and that he seized the can in the presence of independent witnesses and other excise officials on preparing Ext.P1 mahazar and also arrested the appellant at the spot as per Ext.P2 arrest memo. This witness further stated that the appellant and the contraband article were then produced before PW.4, Preventive Officer of Varkala Excise Range.

6. PW.3 was the Preventive Officer who had accompanied PW.6 during the relevant time. The evidence given by PW.3 corroborates the version given by PW.6. PW.4 registered a case against the appellant and produced the appellant and the contraband article before the court with a requisition for taking sample from MO.1 for chemical analysis. Ext.P6 is the chemical analysis certificate. Investigation of the case was then taken over by PW.5 who filed the charge sheet. Two independent witnesses were cited and examined as PWs.1 and 2 to prove that PW.6 had seized MO.1 can from the appellant as alleged by the prosecution. But, these two witnesses turned hostile to the prosecution and stated that they had not seen any arrack being seized from the appellant. The trial court found that Ext.P1 mahazar and Ext.P2 arrest memo contained the signatures of PWs.1 and 2 and hence concluded that they were present at the time of detection of the crime. On analysing the entire evidence, the trial court found that the prosecution succeeded in proving the case against the appellant.

7. The question to be decided in this appeal is whether the evidence adduced by the prosecution is sufficient to find the appellant guilty of the offence alleged against him.

8. The trial court relied mainly on the evidence of PW.6. This

witness though stated that he along with PW.3 had seen the appellant coming towards them with MO.1 can containing 8 litres of arrack and had identified the contents in MO.1 by smelling and tasting, such identification is not seen mentioned in Ext.P1 mahazar. In Ext.P1 it is only stated that a can was seized from the appellant. Further, it is an admitted case that PW.6 had not taken sample from MO.1 in the presence of independent witnesses. This is evident from the evidence of PW.4 who had stated before the court below that he had forwarded the requisition to the court for taking sample for chemical analysis. As per the provisions of the Abkari Act, the officer who detects the crime should take samples in the presence of independent witnesses and the samples and the residue should be sealed, labelled and signed by witnesses so as to prove that the sample analysed was the same sample that was taken from the accused. Further, the evidence adduced by the prosecution does not show when MO.1 was produced before the court below and when sample was taken for chemical analysis. PWs.1 and 2 also deposed that they had not seen seizure of MO.1 from the appellant. Even though PWs. 1 and 2 admitted their signature in Ext.P1 mahazar, they stated that the excise officials had obtained their signature in white paper. Though the trial court found that the signature of PWs.1 and 2 were in printed paper, this Court on a perusal of the same found that the signatures were on white paper. As held in the

decision reported in **Narayani v. Excise Inspector, 2002(3) K.L.T. 725**, it is the duty of the prosecution to adduce evidence to show that the sample and residue were kept in proper custody till the same were produced before the court. That apart, in the judgment of this Court reported in **Rajendran v. State of Kerala, I.L.R. 2007(1)Kerala 708**, this Court had categorically held that it is the duty of the police officers or the excise officers who detect the crime to take samples as per the provisions contained in the Abkari Act and the Kerala Excise Manual and that any violation of the said provisions would create doubt regarding the seizure of contraband articles and the samples produced before the court. In the above circumstances, this Court is of the view that the evidence adduced before the court below is not sufficient to hold that the appellant committed any offence as alleged by the prosecution.

9. Yet another question to be considered in this appeal is regarding the charge framed against the appellant by the court below. The charge framed against the appellant is that he committed offence punishable under Section 55(a) read with Section 8(2) of the Abkari Act. This Court is not in a position to hold that the charge framed is in accordance with the provisions of the Code of Criminal Procedure. Section 55(a) of the Abkari Act defines a distinct offence which is punishable under Section 55(1) of

the Abkari Act and Section 8(1) of the Abkari Act defines yet another distinct offence which is punishable under Section 8(2) of the Abkari Act. Both these offences are different and distinct and hence the charge itself is not clear. On this ground also the judgment of the court below cannot be sustained.

10. In the light of the findings entered by this Court, the judgment under appeal is liable to be set aside. Accordingly, the impugned judgment is set aside and the appellant is acquitted finding him not guilty of any of the offences charged against him. The appellant - accused in Sessions Case No.975 of 2004 on the file of the Additional District and Sessions Court (Fast Track Court-I), Thiruvananthapuram shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEAL NO.157/2007

JUDGMENT

14TH MARCH, 2007